have not turned to such a doctrine, and it is not part of customary international law.[14] And while Van Harten appears to believe that his international investment court would adopt the judicial "passive" virtues and decline to hear a greater number of investor claims on the basis of mootness, lack of ripeness, exhaustion of local remedies, or lack of standing, other international adjudicators, such as those of the WTO, have not demonstrated a comparable fondness for restricting their jurisdiction through such doctrines.[15]

Moreover, Van Harten fails to consider why states have so far resisted proposals for an appellate investment mechanism, as under ICSID. The majority of states appear to fear that a permanent group of appellate judges, like Van Harten's court, would not only add to expense and delay, but might feel *more* empowered than ad hoc arbitrators to advance principles of international investment law and might prove more capable of doing so by developing more consistent jurisprudence. There is no a priori reason to assume that that jurisprudence would be less protective of investors than that now being generated by arbitrators. While there may indeed be cogent reasons to establish an international investment court, Van Harten's book does not articulate them.

Although Van Harten's central premise is that all would be well if we only turned to permanent judges capable of objective applications of international law, there are a few tantalizing suggestions in his book that perhaps the illegitimacy of the investment regime rests not with how arbitrators are appointed, but with the substantive law, including the backdrop rules of general international public international law, that they apply. Van Harten makes the intriguing suggestion in passing that the International Law Commission's Articles on State Responsibility, which have been repeatedly cited in investment arbitrations, might be ill suited to resolving investment disputes. Should the rules for state attribution in those articles, or for remedies for wrongful action, or for the requisites for the excuses of distress or necessity, be modified when the matter to be determined is not interstate liability but the responsibility of a state to a private party? Or does remedying the legitimacy deficit of investor-state arbitration require greater attention to the rules of conflict of interest or of professional responsibility that ought to apply to all participants in investor-state arbitration and not merely its arbitrators?[16] Or should the important legitimacy concerns raised by this book be seen through the prism of constitutionalization, so brilliantly deconstructed in the work of one of Van Harten's own Ph.D. advisers, Deborah Cass?[17] Van Harten does not address these questions, choosing to focus on a very limited issue of institutional design. In doing so, he may be barking up the wrong tree, ignoring a huge forest behind.

JOSÉ E. ALVAREZ
Columbia Law School

Principles of International Investment Law. By Rudolf Dolzer and Christoph Schreuer. Pp. xliii, 433. Index. Oxford, New York: Oxford University Press, 2008. $110, £60, cloth; $45, £25, paper.

The Fair and Equitable Treatment Standard *in the International Law of Foreign Investment.* By Ioana Tudor. Pp. xxxii, 315. Index. Oxford, New York: Oxford University Press, 2008. $110, £60.

There is no contemporary area of international law more active than that of international investment law. If its roots may be found in the annals of diplomatic protection and in the awards of claims

[14] *See, e.g.,* Oil Platforms (Iran v. U.S.), 2003 ICJ REP. 161, para. 48 (Nov. 6) (rejecting application of a margin of appreciation); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, para. 354 (Feb. 6, 2007) (indicating that Protocol 1 of the European Convention on Human Rights permits a margin of appreciation "not found in customary international law").

[15] *See, e.g.,* JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 327–33 (5th ed. 2008).

[16] *See generally,* American Society of International Law Task Force on International Professional Responsibility, *Final Report, at* <http://international.ncbar.org/Newsletters+/Newsletters/Downloads_GetFile.aspx?id=6877>.

[17] DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION (2005).

commissions that intermittently passed upon large numbers of international claims, international investment law emerged as another of the specialized, modern fields of international law with the extraordinary proliferation of bilateral investment treaties—"BITs"—that has taken place in the last forty, and especially twenty, years. Some 2700 BITs have been concluded. They run not only North-South and East-West. Some 600 BITs have been concluded between developing states (a fact that, of itself, undermines the contention of some critics that BITS are foisted by the capital-exporting North on a needy, uncomprehending South).

BITs (and the few multilateral treaties that incorporate like provisions in a broader context—notably, the North American Free Trade Agreement and the Energy Charter Treaty) have made two profoundly important contributions to the progressive development of international law. First, their characteristic provisions have vaulted over the gulf between the positions of capital-exporting and capital-importing states exemplified by the contentious 1974 resolutions of the UN General Assembly on the "New International Economic Order" and the "Charter of Economic Rights and Duties of States." Beginning with the nineteenth-century theses of Calvo, followed by the twentieth-century expropriations such as those of the Soviet Union, Mexico, Iran, and Libya, that gulf was wide and continued to widen. But it has been bridged by the concordant provisions of BITs—and bridged on the terms of the capital exporters. For example, controversy over whether compensation for the taking of foreign property should be limited to that of nationals of the taking state, or be "appropriate," has vanished in favor of acceptance of prompt, adequate, and effective compensation.

Second, BITs afford the foreign investor direct access to international arbitration of disputes arising out of the treatment of that investment by the host state. That progressive provision, when joined with the facilities of International Centre for Settlement of Investment Disputes, has spawned a cascade of international arbitrations whose jurisprudence is the focus of the books under review. ICSID has more than one hundred cases pending, and the number of international investment arbitrations in other institutional forums, such as the Stockholm Chamber of Commerce, as well as ad hoc arbitrations under the UNCITRAL Rules, is considerable. ICSID's pending docket approximates the number of disputes adjudicated by the World Court since 1922.

In the introductory chapter of *Principles of International Investment Law*, Rudolf Dolzer and Christoph Schreuer write that

> in retrospect, it has become clear that the creation of ICSID amounted to the boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment. This is so because of five pertinent features of ICSID: (a) foreign companies and individuals can directly bring a suit against their host State; (b) state immunity is severely restricted; (c) international law can be applied to the relationship between the host state and the investor; (d) the local remedies rule is excluded in principle; and (e) ICSID awards are directly enforceable within the territories of all states parties to ICSID. (P. 20)

They proceed to examine the interpretation and application of investment treaties. They deal with a succession of questions such as nationality, what is an investment, noncompliance by the investor with host state law, regulatory measures, expropriation, and taking of contractual rights. They closely examine BIT standards of protection: fair and equitable treatment; full protection and security; the umbrella clause; national treatment; and most-favored-nation treatment. Related customary international law is considered. The rich and not altogether consistent case law is brought to bear.

Dolzer and Schreuer are established figures in the field because of their previously published works and because they frequently render expert opinions to litigants. *Principles of International Law* will burnish their distinguished credentials. It will be a leading source for practitioners and scholars alike.

Ioana Tudor is a newcomer whose Ph.D. dissertation appears as *The* Fair and Equitable Treatment Standard *in the International Law of Foreign Investment.* Her debut is impressive. She addresses

a critical component of BITs—their standard provision for fair and equitable treatment of the foreign investment. She relates it to, and distinguishes it from, the international minimum standard of treatment of aliens in customary international law. She perceptively observes that "the traditional relationship between a customary rule and a convention is that the latter codifies an existing customary rule. In the case of [fair and equitable treatment (FET)], the process was reversed. The conventional framework served as the primary source for the customary formation of FET" (p. 83).

The provision in BITs for fair and equitable treatment plays a central role in BIT litigation. It is not unusual for a tribunal to deny a claim of measures tantamount to expropriation while at the same time holding that the investor has not been accorded fair and equitable treatment.

Tudor examines the theory and practice—particularly the case law—of fair and equitable treatment in discerning depth. Advocates pleading breach or maintenance of the standard, as well as the tribunal weighing the merits of their arguments, will find her analysis illuminating.

STEPHEN M. SCHWEBEL
Of the Board of Editors

Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses. Edited by Max du Plessis and Stephen Peté. Antwerp: Intersentia, 2007. Pp. xix, 455. €89.

History is filled with episodes of genocide, slavery, torture, forced conversions, and mass expulsions. These episodes remain alive in the memory of many people and sometimes resurge as a background to modern conflicts. Even the existence and boundaries of most modern states are the result of past acts and omissions that would be unlawful today according to international law and most national constitutions and laws. The vast potential scope of claims for past injustices is problematic, including legal obstacles such as of identifying claimants, responsible parties, applicable law, and proximate harm.

Historical injustices are generally understood as events targeting entire groups—either disfavored minorities or foreign populations—and are different from, and more than, individual cases of abuse. They concern populations that have been killed, mistreated, and subject to discrimination by others who through privilege and suppression have enriched themselves. The sheer size of historical claims means that they generally cannot be based upon the remedial paradigm of individual perpetrator, individual victim, and proven quantifiable losses. These differences pose formidable obstacles to reparations, especially when coupled with procedural barriers like statutes of limitations and the principle against nonretroactivity of law. Moreover, true reparations are costly because they entail some loss of social advantage by the powerful.

While the barriers to reparations are significant, historical events are the subject of a growing number of legal or political claims by groups seeking redress. The proliferation of such demands may represent either a global tribute to the strength of human rights doctrine and its moral claim on the international community or the fact that success induces emulation.

Repairing the Past, edited by Max du Plessis and Stephen Peté, is aimed at practitioners and other human rights experts who are engaged in the struggle for reparations for gross human rights abuses of the past. The book is not comprehensive or systematic, but rather consists mainly of a set of case studies on particular reparations claims. Given the background of the editors, it is not surprising that most of these studies focus on events in Africa or on African-American claims relating to the transatlantic slave trade. The various chapters include discussions of the South African Truth and Reconciliation Commission, apartheid, the Herero of Namibia, the African Great Lakes, and reparations for slavery. The cases from outside the African context will be well-known to many readers: the Korean "comfort women"; residential-school abuse of Canadian indigenous children; Australia's "stolen generations"; and Holocaust survivors and their families. Most of the case studies were written by lawyers active in litigation or in alternative efforts to obtain reparations. Several of the chapters are based on previously published accounts by the same authors and